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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 435

SANTOS MIGUEL, PETITIONER

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF THE UNITED STATES, AND FREDERICK W. COLEMAN, CHIEF OF FINANCE, UNITED STATES ARMY

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF OF THE SOLICITOR GENERAL

OPINIONS BELOW

The memorandum opinions of the Supreme Court of the District of Columbia (R. 10–12, 33) are not reported. The opinion of the Court of Appeals of the District of Columbia (R. 42–48) is reported in 66 F. (2d) 564.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1933. (R. 49.) The petition for a writ of certiorari was filed September 6, 1933,

and was granted October 23, 1933. (R. 53.) The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the Comptroller General may be compelled in a proceeding for a mandatory injunction to refrain from interfering with the payment of retired pay to a member of the Philippine Scouts who has been retired by order of the Secretary of War.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are set forth in Appendix A (*infra*, pp. 43–52).

STATEMENT

On April 27, 1932, the petitioner filed a bill in the Supreme Court of the District of Columbia alleging that he enlisted in the Army of the United States on October 1, 1901, and served continuously therein as an enlisted man in the Philippine Scouts until October 31, 1931, on which date, pursuant to his application, he was placed upon the retired list by order of the Secretary of War. (R. 1.) The petitioner then alleged that subsequent to his retirement he submitted to his disbursing officer a voucher for the retired pay and allowances due him for the month of November, 1931; that the disbursing officer transmitted the voucher to the Comptroller General; that the Comptroller General held

that "the retirement of enlisted men of the Philippine Scouts is not authorized even by the remotest implication of the laws," and that by reason of this decision the disbursing officer has declined to make payment to the petitioner. (R. 3–4.) The petition concluded with a prayer that the respondents be restrained and enjoined from preventing the payment to the petitioner of the retired pay and allowances due him for the month of November, 1931, and for subsequent months. (R. 6.)

On May 4, 1932, the respondent Comptroller General filed a motion to dismiss the bill of complaint (R. 7–8), and on May 13, 1932, the respondent Chief of Finance filed a similar motion to dismiss. (R. 9–10.) These motions were based on the grounds, among others, that the petitioner was not entitled to the relief prayed for because the decision of the Comptroller General was final and conclusive, that the proceeding was in reality one against the United States and brought without its consent, and that the petitioner had a plain, adequate and complete remedy at law in the Court of Claims.

On June 10, 1932, these motions to dismiss were overruled. (R. 10–12.) The respondents then filed separate answers, that of the Comptroller General alone objecting to the payment. (R. 12–30, 30–31.) The petitioner moved to strike out these answers on the ground that they did not raise any issue of fact (R. 32–33), and this motion was granted by the court. (R. 33.) The respondents

having elected not to file further answers, the court then entered judgment in accordance with the prayer of the petition. (R. 33–34.)

The respondents then appealed to the Court of Appeals of the District of Columbia, which reversed the judgment of the court below with instructions to dismiss the bill, its opinion being based on the ground that the decision of the Comptroller General was "conclusive so far as the executive branch of the Government is concerned," and that it was not subject to review by mandamus or a similar proceeding. (R. 47.)

SUMMARY OF ARGUMENT

I

In the language of the Comptroller General himself (3 Comp. Gen. 132), "The conclusion is irresistible" that the Philippine Scouts "are a part of the regular Army." Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorized the President "to enlist natives of those Islands for service in the Army, * * *." The petitioner first enlisted under the provisions of this Act, and it is plain that he thereby enlisted "for service in the Army." Not only is this plain from the express terms of the statute under which he enlisted, but it has also been recognized by Congress in the appropriation Acts. The practice under these statutes has also been uniform.

It seems impossible, therefore, to say that there is any substantial basis for contending that the Philippine Scouts are not members of the Army.

If it may fairly be regarded as plain that the petitioner as a Philippine Scout is a member of the Army, then there can be no doubt of the authority of the Secretary of War to retire him.

I

The determination of the War Department as to the petitioner's eligibility to retirement was not subject to reexamination by the Comptroller General. Under the Constitution, the President is the Chief Executive and Commander-in-Chief of the Army. As Chief Executive, it is his duty to see "that the Laws be faithfully executed," and in his capacity as Commander-in-Chief it is peculiarly his function to carry into execution the laws relating to the military establishment. This he does through the agency of the Secretary of War.

The act of the Secretary of War retiring the petitioner with pay was an exercise of the President's jurisdiction in a matter committed to him by the Constitution and by the statutes, and was, we submit, binding and conclusive. The Comptroller General was without power or jurisdiction to review and revise this act or to make independent decision of the same questions of law and of fact that were committed by the Constitution and laws to the decision of the President through his agents, and mere doubts as to the correctness of that decision (if doubts can be said to exist) did not justify refusal upon the Comptroller General's part to accord it credit.

III

The present proceeding is a proper one for determining the questions involved.

The Comptroller General's contention that he is not subject to mandamus or to compulsion in equity because his decision involved an exercise of judgment or discretion does not foreclose an examination of the arguments presented in the first two points of this brief, but depends rather upon the validity of those arguments. If either of those arguments is sound, then the Comptroller General's duty was purely ministerial and his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. His attempted exercise of discretion in a field in which he had no discretion cannot serve to shield him from those remedies.

The contention that this suit must fail because the petitioner has a remedy at law through a suit in the Court of Claims is, we submit, not well taken. That a proceeding such as this may be maintained, although the claimant has a right of action in the Court of Claims, would seem to be established by this Court's decision in *Smith* v. *Jackson*, 246 U.S. 388. A similar result has been reached in many other cases.

ARGUMENT

The major question involved in this case is how far the Comptroller General in an "advance decision" may consider anew and decide questions of

fact and law committed by the Constitution and laws to the jurisdiction of the President or to the head of an Executive Department as his agent, and already decided and acted upon by him. In meeting this issue, we shall contend, first, that the decision of the War Department in this case was correct, second, that under the circumstances here involved the Comptroller General had no authority to reexamine it, and, third, that the present proceeding is a proper one for determining the questions presented.

I

THE PHILIPPINE SCOUTS ARE A PART OF THE REGULAR ARMY

Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, authorized the President—

> to enlist natives of those islands *for service in the Army,* to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. (Italics ours.)

The petitioner first enlisted under the provisions of this Act, and it is plain that he thereby enlisted "for service in the Army." Not only is this plain from the express terms of the statute under which he enlisted, but it has also been recognized by Congress in the appropriation Acts. The pay of the Philippine Scouts is appropriated under the heading "Pay, and so forth, of the Army." The item of pay for enlisted men of the Philippine Scouts

is segregated from that for "Pay of enlisted men of the line and staff, not including the Philippine Scouts." See, *e.g.*, Act of February 23, 1931, c. 279, 46 Stat. 1277, 1280. But this does not mean that Philippine Scouts are not enlisted men; the language just quoted shows that they are, for Congress there segregated them from other "enlisted men of the line and staff." Such segregation is a means frequently used by Congress to limit the size of particular units of the Army. Appropriations for the "allowances" of Philippine Scouts have never been segregated. They have always been paid from items under "Pay of the Army" applicable to all enlisted men, and are now so paid. Until June 30, 1902, the appropriations for pay were not segregated and the Philippine Scouts and all other enlisted men of the Army were paid from the general appropriation "For pay of enlisted men." Act of March 2, 1901, c. 803, 31 Stat. 895, 896. No question as to the legality of such payment was ever raised by the accounting officers. This contemporaneous construction is obviously entitled to great weight. See also House Doc. No. 254, 57th Congress, 1st Sess., and the provisions of Section 2 of the Act of June 3, 1916, c. 134, 39 Stat. 166 (*infra*, p. 45), and of Section 2 of the Act of June 4, 1920, c. 227, 41 Stat. 759 (*infra*, pp. 45–46).

Moreover, not only are the statutes clear, but the practice under them has been uniform. The War Department as early as 1903 specifically ruled that

the Philippine Scouts were "a component part of the Army of the United States" and this ruling has been uniformly upheld since that time. See pp. 12, 38 of the petitioner's brief. In *Atkinson* v. *Stewart,* 23 Philippines, 405, it was judicially determined that the Philippine Scouts are a part of the regular Army. The Bureau of Pensions has recognized the pensionable status of Philippine Scouts as enlisted men of the regular Army since 1903, and the Comptroller of the Treasury and the Comptroller General himself have held them so repeatedly. 15 Comp. Dec. 304; 25 Comp. Dec. 709; 27 Comp. Dec. 85; 3 Comp. Gen. 132; 4 Comp. Gen. 82; A–6560, January 31, 1925, unreported.[1] In the opinion in 3 Comp. Gen. 132, the Comptroller General reviewed the statutes and the previous decisions with respect to the Philippine Scouts and said that

> *the conclusion is irresistible that they are a part of the Regular Army,* existing by virtue of, and subject to, the limitations of special statutes, and are within the general laws applicable to the Regular Army only when the extension to them of the general laws is not

[1] The status of the Philippine Scouts seems indistinguishable from that of the "Indian Scouts" maintained for sixty-eight years under authority of Section 6 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 333, whose enlisted men as members of a temporary and provisional component of the regular Army have, with the approval of the accounting officers, been accorded the right of retirement with pay at least since 1905.

> inconsistent or in conflict with the special statutes applicable to them, and to include them is clearly within the intent of the general law. (Italics ours.)

It seems impossible, therefore, to say that there is any substantial basis for contending that the Philippine Scouts are not members of the Army. If it may fairly be regarded as plain that the petitioner as a Philippine Scout is a member of the Army, then there can be no doubt of the authority of the President through the Secretary of War to retire him. The Act of March 2, 1907, c. 2515, 34 Stat. 1217, provides:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *.

The pay and allowances to be paid to enlisted men of the Philippine Scouts are governed by Section 36 of the Act of February 2, 1901, c. 192, 31 Stat. 748, 757, as amended by the Act of May 10, 1926, c. 279, 44 Stat. 496,[2] which provides that:

> The pay and allowances of whatever nature and kind to be authorized for the en-

[2] The reports of the committees of Congress with respect to this amending Act make it plain that Congress understood that Philippine Scouts were members of the Army. In these reports enlisted men of the Scouts are referred to together with "enlisted men in the other branches of the Regu-

> listed men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * *

The amount of the allowance, within the limit fixed, is committed ultimately to the Secretary of War, and there is no suggestion that the Secretary has exceeded these limits. The right to the allowance is, we contend, indisputable on the face of the statutes and the long continued practice under them.

None of the authorities relied upon by the Comptroller General in his decision (R. 24–30) and referred to in the opinion of the court below (R. 44–46) casts any doubt, we submit, on this conclusion. Section 26 of the National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 185, by its express terms relates to officers of the Philippine Scouts only. Section 22 of the Act of June 4, 1920, c. 227, 41 Stat. 759, 770, expressly provides that "Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts." A similar express provision appears in Section 21 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 633. The Comptroller General's misconception as to these statutes relat-

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lar Army." Senate Report No. 90, 69th Cong., 1st Sess.; House Report No. 798, 69th Cong., 1st Sess. See also Senate Report No. 195, 68th Cong., 2d Sess., p. 2, relating to an earlier Bill.

ing to officers of the Philippine Scouts is apparently due to his failure to understand that until the enactment of the Act of June 4, 1920, *supra*, the officers of the Philippine Scouts in the lower ranks were usually enlisted men of other branches of the regular Army whose appointments as officers of the Philippine Scouts were only provisional. It was necessary to enact special legislation with respect to their retirement so that they could retire with the allowances of officers instead of being limited to the allowances of enlisted men. In view of the meticulous care in which it was specified in these Acts that they should not affect the status of enlisted men in the Philippine Scouts, it must be apparent that they do not support the Comptroller General's decision. Reference to the conclusion of the Comptroller General's decision seems to show that the decision is based on the Comptroller General's idea of proper public policy in a matter which is solely the concern of Congress and in which Congress has plainly spoken.

So far as this case is concerned with the validity of the petitioner's retirement with pay, the language of this Court in *Alaska Steamship Co.* v. *United States*, No. 56, decided December 4, 1933, seems directly applicable. In that case, this Court held controlling the settled practice of the Department of Commerce, notwithstanding a series of adverse decisions by the Comptroller General, and said:

> The Department of Commerce, not the Comptroller General, is charged with the administration of the statute * * * and its administrative practice should be followed if thought to be controlling. But in any case, there is no ambiguity or uncertainty in the statute with respect to the point urged by the government, and, in carrying it out as written, there is no administrative difficulty which would call for construction. The rulings of the Comptroller General rest upon a proposition so plainly contrary to law and so plainly in conflict with the statute as to leave them without weight as administrative constructions of it.

We submit, therefore, that the right of the petitioner to retirement is clear, and that the decision of the Comptroller General was plainly wrong.

II

THE DETERMINATION OF THE SECRETARY OF WAR AS TO THE PETITIONER'S ELIGIBILITY TO RETIREMENT WAS NOT SUBJECT TO REEXAMINATION BY THE COMPTROLLER GENERAL

Under the Constitution, the President is the Chief Executive and Commander-in-Chief of the Army. As Chief Executive it is his duty to see "that the Laws be faithfully executed," and in his capacity as Commander-in-Chief it is peculiarly his function to carry into execution the laws relating to the military establishment. This he does through the agency of the Secretary of War, who

under the Act of August 7, 1789, c. 7, 1 Stat. 49 (*infra*, pp. 43–44), is made his constitutional and statutory *alter ego* for that purpose.

The petitioner's application for retirement in this case was made under the Act of March 2, 1907, c. 2515, 34 Stat. 1217 (*infra*, p. 49), which provides that the application shall be made "to the President," a Congressional recognition of the President's authority as constitutional Commander-in-Chief to administer the laws relating to the Army. Since the application is specifically required to be made to the President, it is a fair inference that the determination of the questions raised by the application shall be made by the President through his duly constituted agents. In this case that determination was made by order of the Secretary of War, pursuant to which the petitioner was placed upon the retired list (*infra*, p. 52). Congress having made an appropriation specifically designated "for the pay of retired enlisted men" which was both existent and available, the petitioner was clearly entitled to receive his retired pay and allowances therefrom.

The act of the Secretary of War retiring the petitioner with pay was an exercise of the President's jurisdiction in a matter committed to him by the Constitution and by the statutes, done through his constitutional and statutory agent, the Secretary of War, and was, we submit, binding and conclusive. The Comptroller General was without

power or jurisdiction to review and revise this act or to make independent decision of the same questions of law and of fact that were committed by the Constitution and laws to the decision of the President through his agents, and mere doubts as to the correctness of that decision (if doubts can be said to exist) did not justify refusal upon the Comptroller General's part to accord it credit.

The question of the Comptroller General's power and authority, and the effect which must be given to his advance decision turn upon the proper construction of Section 8 of the Act of July 31, 1894, c. 174, 28 Stat. 162, 208. That section provides as follows:

> Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

Prior to the enactment of this statute, the Comptrollers of the Treasury were not legally empowered to make "advance decisions," though they were accustomed to do so upon request. Such "decisions," however, were not binding upon them.

See 20 Ops. Atty. Gen. 654. Up to that time, the principal powers of the Comptrollers relating to the settlement of accounts, so far as they concern the instant case, had been expressed in three statutes, the first of which was the Act of September 2, 1789, c. 12, 1 Stat. 65, establishing the Department of the Treasury. Section 3 of that Act enumerated the duties of the Comptroller, among which were superintendence of the adjustment and preservation of public accounts, the examination of accounts settled by the Auditor and certification of balances arising therein to the Register, and the countersigning of warrants drawn by the Secretary of the Treasury which were warranted by law. Other duties related to forms for collecting revenues, and the manner of keeping and stating the accounts of employees. He was required to provide for the payment of moneys collected, and to direct prosecutions against delinquent revenue officers and debtors of the United States.

The second statute was the Act of March 3, 1817, c. 45, 3 Stat. 366 (reenacted as Section 236 of the Revised Statutes), which provided that:

> All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Treasury Department.

The third statute was the Act of March 30, 1868, c. 36, 15 Stat. 54 (reenacted as Section 191 of the

Revised Statutes), which was passed to settle a long-standing dispute between the accounting officers and certain department heads who had endeavored to direct changes in balances certified by the Comptrollers, and which the latter held to be final. It provided:

> That the act of March 3, 1817 * * * shall not be construed to authorize the heads of departments to change or modify the balances that may be certified to them by the commissioner of customs or the comptrollers of the treasury, but that such balances, when stated by the auditor and properly certified by the comptroller, * * * shall be taken and considered as final and conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts: *Provided*, That the head of the proper department * * * may submit to such comptroller any facts * * * affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive as hereinbefore provided.

The decisions of this Court in *United States* v. *Jones*, 18 How. 92, 95, *United States* v. *Johnston*, 124 U.S. 236, 252, and in *United States* v. *Waters*, 133 U.S. 208, and that of the Court of Claims in *Billings* v. *United States*, 23 C.Cls. 166, 177–181, appear to have determined definitely that neither under their general powers to settle and adjust claims and demands, nor under their power to state conclusive balances, were the Comptrollers vested

with authority to go behind the decisions of the heads of executive departments upon questions of law and fact relating to subjects confided to their several jurisdictions by the Constitution and laws. In *United States* v. *Jones*, 18 How. 92, 95–96, *supra*, this Court said:

> The secretary of the navy represents the President, and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive.

In *United States* v. *Johnston*, 124 U.S. 236, 252, *supra*, this Court said, quoting from *United States* v. *Jones*, *supra*:

> The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.

The Act of July 31, 1894, *supra*, known as the Dockery Act, abolished the First and Second Comptrollers and imposed all their duties upon one Comptroller of the Treasury. This statute was enacted following a report made to Congress by a Joint Committee appointed to revise governmental accounting and auditing. The Committee employed

experts who, *inter alia,* recommended to it (26 Cong. Rec. 4303), that:

> It should be provided that disbursing officers may apply for, and the Comptroller shall render his decision, upon any question involving a payment to be made by them, which decision, when rendered by the Comptroller, shall govern the Auditor and the Comptroller in passing upon the account containing said disbursement.

The Joint Committee adopted this recommendation, and Section 8 of the Act (*supra,* p. 17) was the result.

It thus appears that Congress had in mind legalization of the custom of rendering advance decisions and desired to provide protection to disbursing officers by making it impossible for the Comptroller of the Treasury to disallow payments made by them in reliance upon his decisions. The intended scope of the Act was to permit "pre-audit" of any account which the Comptroller was authorized under already existing laws to settle and adjust, and had no reference to powers and jurisdiction, except as it allowed their exercise before instead of after payments were made. Having regard for the decisions of this Court in the *Jones* and *Waters* cases, *supra,* it cannot be said that the words "any question involving a payment" either included or were intended to include competent decisions already made within their several jurisdictions by the President or by department heads, for

the effect of the *Jones* and *Waters* cases is to make questions resolved by such decisions no longer questions, but adjudications so far as the accounting officers are concerned. Nor can it be supposed that Congress intended by this Act to overturn the whole existing system of governmental administration by creating a super-executive, and in effect to nullify more than a hundred years of statutory enactments by which were vested in the heads of the several executive departments jurisdiction to decide such questions of law and fact as arose in the administration of the laws relating to subjects confided to their departments. If the Congress had any such intention, it would have been expressed in plain and unmistakable terms; nothing would have been left to inference and implication. We contend, therefore, that Section 8 of the Dockery Act related solely to the time of exercise of the Comptroller's powers and not to their scope, and vested him with no broader jurisdiction and no greater powers than he already possessed under the Acts of September 2, 1789, March 3, 1817, and March 30, 1868, *supra,* and that if he might not legally go behind and overrule competent decisions of department heads before the Dockery Act became effective, he had no greater authority to do so afterward.

By Section 301 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 23, the General Accounting Office was established, to be

"independent of the executive departments and under the control and direction of the Comptroller General of the United States"; and by Section 304 of the same Act (*infra,* pp. 49–50) all powers and duties of the Comptroller of the Treasury and the six auditors were "vested in and imposed upon the General Accounting Office," to be "exercised without direction from any other officer" than the Comptroller General. The same section reenacts the substance of the Act of March 30, 1868, *supra,* making "the balances certified by the Comptroller General * * * final and conclusive upon the executive branch of the Government." Section 305 (*infra,* p. 50) reenacts Section 236 of the Revised Statutes (the Act of March 3, 1817), while Section 312 (*infra,* pp. 50–51) imposes upon the Comptroller General, *inter alia,* the duty of making investigations "relating to the receipt; disbursement and application of public funds," and of making reports to Congress relating thereto, with recommendations concerning the legislation he may deem necessary "to facilitate settlement," and to promote economy in expenditures. He is also required to make special reports to Congress of every illegal expenditure or contract made by any department or establishment, and to submit reports concerning the administrative examination of accounts and claims.

There is nothing in the committee reports of Congress with respect to the Budget and Accounting Act of 1921 which indicates in any way that

Congress intended by that Act to endow the Comptroller General with authority to review and redetermine questions already passed on by the executive departments in the performance of their duties to administer the laws. Instead the reports indicate plainly that what Congress desired was "an independent audit." House Report No. 14, 67th Cong., 1st Sess., p. 7. An independent audit connotes the keeping of records and the making of reports, not the determination of questions arising in the administration of the laws. See also House Report No. 96, 67th Cong., 1st Sess. That this was the intention of Congress was further made plain by the report of the Special Committee of the Senate on the National Budget with respect to the bill which President Wilson vetoed (House Doc. No. 805, 66th Cong., 2d Sess.), but which was substantially the same as the Budget and Accounting Act finally enacted in 1921. In this report (Senate Report No. 524, 66th Cong., 2d Sess., p. 7) the committee said:

> Any satisfactory system of Government accounting should have as its underlying principle the investment of final and exclusive authority and responsibility over all accounting and auditing operations in a single official; and this principle should be applied to the furthest extent consistent with the exercise of an undivided control over strictly administrative matters by the heads of departments and establishments.

It is thus plain that Congress had no intention to interfere with the "undivided control over strictly administrative matters by the heads of departments and establishments." It was the purpose of Congress that the Comptroller General should "exercise in general a control over all the accounting procedures of the Government." Senate Report No. 524, 66th Cong., 2d Sess., p. 9. But "the accounting procedures" relate to accounting, and power over accounting is not power to decide how the laws shall be administered. It is rather power to decide how the books shall be kept after the laws have been administered by those to whom that duty has been entrusted by the Constitution and the laws.

The effect of the Budget and Accounting Act, therefore, is to vest in the Comptroller General, as head of the General Accounting Office, the identical powers and jurisdiction possessed by his predecessors, the Comptroller of the Treasury and the various Auditors, over the settlement and adjustment of claims and demands against the United States and the accounting for public funds disbursed by executive officers. While the Act imposes upon him certain other duties not required of his predecessors, as enumerated in Section 312, and makes him independent of the *executive departments* (not, it is well to note, of the *Executive*), there is no provision of the Act which serves to broaden or enlarge his powers and jurisdiction over that pos-

sessed by his predecessors in the matter of the settlement and adjustment of accounts.

In his brief filed in opposition to the writ (p. 19), as well as elsewhere, the Comptroller General has in effect asserted that in the exercise of his power to settle and adjust, he acts as a legislative agent. See the articles cited in Appendix B, *infra*, p. 53. In spite of this contention to the contrary, however, it would seem clear from the form of his appointment and from considerations of the separation of powers, that he is an executive officer. But even if he were solely a legislative officer, such agency would confer upon him no broader jurisdiction or greater power than may be read in the statutes. The assertion of legislative agency would in any event appear ineffective as a basis upon which to predicate a power to go behind and to supervise or overrule the acts of the Executive branch of the Government done within the lawful scope of its jurisdiction. It is the duty of the Congress to make the laws, not to carry them into execution. Cf. 37 Ops. Atty. Gen. 56.

The chief and the most important duty of the General Accounting Office and of the Comptroller General as its head is accounting. All other duties imposed by the Budget and Accounting Act are incidental to this; and accounting, which is only a step in the process of seeing that the laws relating to expenditure of public funds are faithfully executed, would seem clearly to constitute a purely executive function. *Springer* v. *Philippine Islands*,

277 U.S. 189, 202. If this be not so, it is the Congress upon whom rests the duty to see to it, through its agents, that the laws be faithfully executed. But the Constitution places that obligation upon the President. We contend, therefore, that under existing laws, the Comptroller General is not empowered to go behind and to override competent decisions of the President and the heads of executive departments upon subjects confided by the laws to their several jurisdictions; and that, so long as they act within such jurisdiction, and their decisions are neither arbitrary and capricious, nor obviously wrong (*cf.* 34 Ops. Atty. Gen. 250), and no provision for their review is made by the laws, those decisions are conclusive upon the Comptroller General, and he must accept them as the basis for his audits. *Wright* v. *Ynchausti & Co.*, 272 U.S. 640; *Posados* v. *Manila*, 274 U.S. 410.

The view just expressed, moreover, accords with that expressed in many opinions of the Attorneys General throughout the years. 5 Ops. Atty. Gen. 284; 26 Ops. Atty. Gen. 81; 28 Ops. Atty. Gen. 180; 34 Ops. Atty. Gen. 162; *id.* 250; *id.* 311; 37 Ops. Atty. Gen. 95. See also 25 Ops. Atty. Gen. 301, 303–304. In 37 Ops. Atty. Gen. 95, it appeared that the Attorney General had examined certain abstracts of title and expressed his opinion as to the ownership of lands conveyed to the United States, and that the Comptroller General, before approving disbursements made on account of the

purchase price, had demanded that the abstracts be submitted to him. The Attorney General said, in part:

> It is clear that if the purpose of the Comptroller General were to review the work done by me * * * in examination of the title to determine ownership * * *, he would be doing over again the work done in this Department and assuming to form his own judgment on matters which the acts of Congress have left to the decision of the Attorney General. There are a number of statutes * * * which place upon the Attorney General the * * * duty of examining titles and giving an opinion as to ownership of land in connection with purchases and condemnations by the United States. It is clear that in auditing disbursements it is not the duty of the Comptroller General to go behind the opinions of the Attorney General and form his own conclusions as to the state of the title. In making his audit he should start with the opinions of the Attorney General as a basis and accept the conclusions which the Attorney General has reached * * * (p. 98).
>
> * * * * *
>
> At one time the Comptroller General's office was inclined to the view that the general language of the Budget and Accounting Act superseded these various special statutes and authorized the Comptroller General to go behind the findings of the other executive officers of the Government and form his own

conclusions on matters they had determined; but that question has been repeatedly passed on in opinions of the Attorneys General and in decisions of the courts and has been set at rest. * * *

The question was finally disposed of by the Supreme Court of the United States in *Wright* v. *Ynchausti & Co.*, 272 U.S. 640. It appears from that decision that Wright, the Insular Auditor of the Philippine Islands, was performing * * * substantially the same functions as are performed by the Comptroller General in the United States and was operating under an act * * * which, in the respects here material, was substantially like the Budget and Accounting Act under which the Comptroller General operates, and authorized the Insular Auditor to examine and settle all accounts * * *, and it provided that the decisions of the Auditor should be final and conclusive upon the executive branches of the Philippine Government just as does the Budget and Accounting Act of the United States. (p. 99–100.)

* * * * *

The official report of that case shows that Counsel from the office of the Comptroller General of the United States appeared there in an effort to sustain the position of the Insular Auditor, the contention of the Insular Auditor being the same as had previously been made in the office of the Comptroller General of the United States. This decision confirmed the view previously

> taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts the Comptroller General cannot go behind findings and decisions of the heads of the executive departments in matters specially entrusted to their judgment by statute.
>
> As the duty of examining titles * * * is vested by law in the Attorney General, his opinions by law bind all executive departments, and in auditing disbursements * * * the Comptroller General may not go behind these opinions but is bound by them * * *. (pp. 100–101.)

Just as the examination and determination of titles is peculiarly the function of the Attorney General, the determination of who is and who is not an enlisted man in the Army is, we submit, peculiarly a military function and peculiarly for determination by the President through the War Department. This is especially true in this case in view of the express provision of the statute that the application for retirement shall be made "to the President." That determination having been made, the language of the Attorney General in 34 Ops. Atty. Gen. 162, 171, is, we submit, applicable:

> The sole duty of the Comptroller General in regard to such action is to be governed by it in adjusting the amount of pay to which the enlisted man is entitled.

When, as in this case, a designated subject matter has been definitely committed by the Constitution

and laws to the President or a department head, his conclusions as to the law and facts, in a specific case pertaining to that subject matter, "do not require the approval of any officer of another department to make them valid and conclusive." *United States* v. *Jones,* 18 How. 92, 96. That the accounting officers disagree with those conclusions; that they might, or even would have reached a different result, does not empower them to revise the decision of him to whom the law has confided it. Accounting officers are not vested with jurisdiction to sit in review on the acts of the President or his subordinates done within the scope of their lawful jurisdiction. A statute which undertook to give them such power would be of very doubtful validity. *Springer* v. *Philippine Islands,* 277 U.S. 189; *Myers* v. *United States,* 272 U.S. 52; 37 Ops. Atty. Gen. 56.

Nor can the position of the Comptroller General be sustained that at least since the Act of March 30, 1868, it has been the undisputed and uninterrupted practice of the Comptroller (from which practice he deduces the right and power) to decide every question of law and fact considered by him necessary to be decided in determining whether payment from an appropriation is authorized.

Though it be admitted that such a practice has been maintained by the Comptrollers when possible, and that the Comptroller General has asserted power to consider and decide anew questions of law and fact committed by the laws to the jurisdiction of other officers and already decided by

them (6 Comp. Gen. 604, 606), to ignore the opinions of the Attorney General (2 Comp. Gen. 784; 3 Comp. Gen. 497; 4 Comp. Gen. 773; 5 Comp. Gen. 688), and even to decide anew questions already decided by the courts (3 Comp. Gen. 316; *id.* 479; *id.* 545),[3] it is also true that such broad claims upon his part have been productive of much litigation and discord, and that the Attorneys General have denied the existence of such powers (see pp. 25–28, *supra*). In such a situation, it is difficult to consider such a practice as either undisputed or uninterrupted, or as furnishing a valid basis for inference that the law is as the Comptroller General contends. As pointed out in the petitioner's brief (pp. 22–24), as long ago as 1901 Secretary of War Root entered a formal War Department order directly opposing the claims of the Comptroller to decide military questions.

The available materials would seem to show that neither the accounting officers nor the executive departments can rely on an unbroken practice concerning their respective powers and functions. As in the case of the Presidents and Congress, both parties have often asserted their powers, and in the course of time the one and then the other has been in the ascendency in the exercise of power. The issue has been a continuous one, often acute and never settled. But the claim of power is not suffi-

[3] In several of the books and articles cited in Appendix B (*infra*, p. 53), similar broad claims are made on behalf of the Comptroller General.

cient to constitute a grant of power. We contend that no power has been granted to the Comptroller General to revise the determinations of the executive departments in the performance of their duties, and that such a grant if made would be an unconstitutional interference with the President's duty "to see that the Laws be faithfully executed." *Myers* v. *United States,* 272 U.S. 52.

III

THE PRESENT PROCEEDING IS A PROPER ONE FOR DETERMINING THE QUESTIONS INVOLVED

The Comptroller General contends that regardless of the merits of the questions presented above in this brief, the present action must fail for two reasons, among others, first, because his decision involved an exercise of judgment and discretion, and that it consequently may not be coerced in mandamus or in equity (*Decatur* v. *Paulding,* 14 Peters 497), and second, because the petitioner has a remedy at law through a suit in the Court of Claims for his retired pay. We submit that neither of these positions is well taken.

The Comptroller General's contention that he is not subject to mandamus or to compulsion in equity because his decision involved an exercise of judgment or discretion does not foreclose an examination of the arguments presented in the first two Points of this brief, we submit, but depends rather upon the validity of those arguments. An officer required to make a decision is not immune

from mandamus if his decision when made is arbitrary or plainly wrong. *Roberts* v. *United States,* 176 U.S. 221, 231; *Work* v. *McAlester-Edwards Co.,* 262 U.S. 200, 208. If, as we contend in Point I above, the decision of the Comptroller General in this case was plainly wrong, his refusal to follow the plain mandate of the statute may be coerced in mandamus or in equity. But even if that decision cannot be said to be plainly wrong, applicability of the rule of *Decatur* v. *Paulding,* 14 Peters 497, *supra,* presupposes jurisdiction and authority to make the decision to which it is to be applied. Therefore, if we are correct in our contention in Point II above that the Comptroller General was without authority to review the determination of the War Department on a subject committed by the Constitution and the laws to the President and his subordinates, the duty of the Comptroller General in this case is clear and merely ministerial, and his exercise of discretion in a field in which he had no discretion does not serve to shield him from mandamus or a court of equity. *Wright* v. *Ynchausti & Co.,* 272 U.S. 640; *Posados* v. *Manila,* 274 U.S. 410. In *Wright* v. *Ynchausti & Co., supra,* this Court said (p. 651) with respect to the duty of an auditing officer in such a situation that—

> his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal,

and is applicable to an existing appropriation; and, having been satisfied as to these preliminaries, his duty is merely ministerial.

The Comptroller General's first contention, therefore, is not well taken if either of the arguments already presented in this brief are sound.

The Comptroller General's second contention is that this suit may not be maintained because the petitioner has an adequate and complete remedy at law through a suit in the Court of Claims. Reference to *Pocono Pines Assembly Hotels Co.* v. *United States,* 69 C.Cls. 91, 73 C.Cls. 447, third opinion November 14, 1932, not yet reported, and *Dalton* v. *United States,* 71 C.Cls. 421, in the latter of which the judgment has not yet been paid,[4] shows that it is not entirely clear that the remedy in the Court of Claims is plain and adequate. But whether it is or not, the decisions of this Court show, we submit, that the right to maintain such a

[4] On January 4, 1932, the Chairman of the Committee on Appropriations of the House of Representatives stated on the floor of the House, with respect to that case (75 Cong. Rec. 1233):

"Now, the committee thought it was not fair to the Treasury and to the taxpayers, especially in view of the representation he had made to the committee, for him to go to the Court of Claims; after his services were concluded, and ask for the payment of his retired pay, and I hope that this Congress and all future Congresses will decline to pay the judgment he has obtained, and for that reason we have eliminated it."

See also House Report No. 15, 72d Cong., 1st Sess., and 75 Cong. Rec. 1306–07, Jan. 5, 1932.

suit does not constitute a bar to the maintenance of the present action.

That a proceeding such as this may be maintained, although the claimant has a right of action in the Court of Claims, would seem to be established by this Court's decision in *Smith* v. *Jackson*, 246 U.S. 388. The questions there decided both with respect to the powers of the Comptroller General, and the right to maintain the suit despite the existence of a remedy in the Court of Claims, are so similar to that raised by the Comptroller General here that there would seem to be no doubt as to its conclusiveness in the present case. From the record in that case (No. 457, October Term, 1917) and from the opinions of the lower courts (241 Fed. 747) the facts may be summarized as follows:

William H. Jackson was appointed the District Judge for the Canal Zone. H. A. A. Smith, the Auditor of the Panama Canal, refused to pay to him his full salary, but, instead, deducted certain sums which he asserted were due to the United States from the judge on account of the rental of a house occupied by the judge. An additional sum was also withheld because the judge had been absent from the Canal Zone for a longer period than that allowed by law. These sums were withheld by the Auditor, not on his own initiative, but pursuant to express decisions of the Comptroller of the Treasury. The first of these decisions was rendered on June 23, 1914. The Comptroller was asked to reconsider his decision and on December 28, 1914,

he rendered a new opinion adhering to his previous decision. These decisions were rendered by George E. Downey, Comptroller of the Treasury. On September 16, 1915, W. W. Warwick had become Comptroller of the Treasury, and on that date he rendered a decision to the same effect. On March 25, 1916, the same officer rendered another and comprehensive opinion in which he concluded that "payment of salary to the amount of the debt should not be made by the paymaster of the Panama Canal." The full text of these various opinions appears at pages 20–33 of the record in this Court in *Smith* v. *Jackson*, No. 457, October Term, 1917.

In the meantime, however, the Attorney General, in response to a request for his opinion from the Secretary of War, had decided that no portion of the judge's salary could be withheld. (R. 34–35, in No. 457, October Term, 1917.)

The District Judge filed a petition for a writ of mandamus in the District Court for the Canal Zone, naming the Auditor of the Panama Canal as the respondent, seeking to compel him to pay the amounts which had been withheld. The respondent contended that the Court could not issue mandamus because the plaintiff had a remedy through a suit in the Court of Claims. But, the District Court granted the writ of mandamus as prayed for, and this was affirmed by the Circuit Court of Appeals for the Fifth Circuit on the opinion of the District Court (241 Fed. 747). On a writ of error to this

Court, the judgment was affirmed in a summary opinion in which the Court concluded (p. 391) that "the prosecution of the writ of error from this Court constituted a plain abuse by the Auditor of his administrative discretion."

It is as true of a petition for mandamus as of a bill in equity that, as a general rule, relief will not be granted if the petitioner has another plain, adequate and speedy remedy. *Rex* v. *Barker*, 3 Burr. 1265, 1267, per Lord Mansfield; *Marbury* v. *Madison*, 1 Cranch, 137, 169; High, Extraordinary Legal Remedies (2d Ed.) Sec. 15. Since it was held in *Smith* v. *Jackson* that the decision of the Comptroller of the Treasury and the actions of his subordinates in pursuance thereto were subject to review by mandamus, notwithstanding the existence of a right of recovery in the Court of Claims, it must follow that the existence of a right of recovery through suit in the Court of Claims is not a bar to review through a similar proceeding in this case.

It is no answer to say that the question involved in *Smith* v. *Jackson* was one of pay, for that is the question here. It is likewise no answer to say that the right to pay there was clear and the question raised was the legality of a set-off, for if we are right in our argument in either Point I or Point II above the right to pay here is no less clear and there is no question of set-off.

Besides *Smith* v. *Jackson*, reference may be made to another group of decisions, commonly called the dependent mother cases. In each of them there had

been withheld from the plaintiff, an officer of the Army or Navy, a part of his pay because of the prior payment of allowances granted by law to officers having dependent mothers. These prior payments had been disallowed by the Comptroller General on the ground that the mothers in question were not in fact so dependent. In some of these cases the plaintiffs asked mandamus to compel payment of their pay without deduction, in others injunction to prevent the threatened deduction. The defendants were the disbursing officers charged with the duty of paying the several plaintiffs, and in some, the Comptroller General himself also. In this class of cases, as in the present case, defense was made that plaintiff had a remedy by suit in the Court of Claims (which cannot be denied), and therefore had no other remedy. In *Mare* v. *Alexander,* 2 F. (2d) 895, the District Court for Massachusetts disposed of this argument, saying (p. 897):

> The government further contends that the relator in this case has mistaken his remedy, as he should have sued in the Court of Claims. The answer to this contention is that the Comptroller General has mistaken his remedy. Instead of recovering for the United States the sum deemed to be due by an imperial fiat—let this be done—without hearing the parties in interest he should have instituted a suit in a court of justice. *U.S.* v. *Olmstead,* 118 F. 433. Doubtless it would be convenient if the matter could be settled by the simple process of ordering the

> disbursing officer to withhold the lieutenant's salary—in the language of the street, "docking his pay"—but no such arbitrary power has been invested in the Comptroller General by this new legislation. As Judge Clayton emphatically remarks: "There cannot be such an autocrat. Our government cannot be reduced to a bureaucracy." 241 F. 747, 755, 758.

The decision of the District Court in the above case in favor of the plaintiff was affirmed by the Circuit Court of Appeals for the First Circuit. *Alexander* v. *Mare*, 5 F. (2d) 964.

In *McCarl* v. *Cox*, 56 App.D.C. 27, 8 F. (2d) 669, another case of the same class, the argument was again made that the plaintiff's sole remedy was by suit in the Court of Claims. The court quoted with approval (56 App.D.C. 28, 8 F. (2d) 670), the passage already quoted from *Mare* v. *Alexander*, and concluded (p. 671):

> We therefore rule that, the salary of Commander Cox having been regularly appropriated for, it was the plain ministerial duty of the accounting officers to pay that salary without deductions, and that the decree of the court below was right.

Certiorari was refused by this Court, 270 U.S. 652.

Other cases of the same class are *Dillon* v. *Groos*, 299 Fed. 851 (N.D.Fla.); *Howe* v. *Elliott*, 300 Fed. 243 (S.D.Fla.); *Wylly* v. *McCarl*, 2 F. (2d) 897 (D.Mass.), affirmed, 5 F. (2d) 964 (C.C.A. 1st); *McCarl* v. *Pence*, 57 App.D.C. 159, 18 F. (2d) 809;

Baker v. *McCarl,* 58 App.D.C. 69, 24 F. (2d) 897; *McCarl* v. *Loud,* 59 App.D.C. 238, 38 F. (2d) 943; *McCarl* v. *Emerson,* 59 App.D.C. 239, 38 F. (2d) 944; *McCarl* v. *Orcutt,* 59 App.D.C. 239, 38 F. (2d) 944. In every case of this class the contention might have been made, and in most of them was made, that since the plaintiff had the right of suit in the Court of Claims, he had no remedy by mandamus or bill in equity. In every case cited, the contention was rejected.

The right to pay, and the right to be paid from a designated fund, should not be confused. The Court of Appeals, however, failed to make this distinction when it held that the right to pay "depends upon whether Congress has provided the right * * * and has made an appropriation accordingly. As to that the Comptroller General * * * has the right of determination * * *." (R. 48.)

The right to pay is the inseparable concomitant of retirement and depends in no degree upon any determination by the Comptroller General nor upon the adequacy or even the existence of an appropriation. 20 Comp. Dec. 819, 821; *Graham* v. *United States,* 1 C.Cls., 380; *French* v. *United States,* 16 C.Cls. 419, 422; *Langston* v. *United States,* 21 C.Cls. 10, affirmed, 118 U.S. 389; *United States* v. *Vulte,* 233 U.S. 509. The right to be paid from designated public funds, however, does

depend upon the existence of unexpended funds in an applicable appropriation; that question, and we submit, that question only, was properly for the Comptroller General to determine. But there is an express appropriation "for the pay of retired enlisted men," and the conclusion that that appropriation is inapplicable and unavailable for the pay of a retired enlisted man cannot be arrived at by any reasonable process. The mere statement of the proposition at once stamps it as arbitrary, capricious and obviously erroneous. The accounting officers have no power to modify the provisions of the appropriation Acts, nor to refuse application of appropriations to the purposes designated by their terms.

The plain language of the appropriation here involved itself decided the only question properly submitted to the Comptroller General. Being bound by the terms of the law, "There was nothing left to be determined by his judgment or according to his discretion." *Smith* v. *Jackson*, 241 Fed. 747, 775 (D. Canal Zone), affirmed, 246 U.S. 388. The petitioner's right to receive his pay from this appropriation was clear and the duty of payment became one, which, upon the fact existing, the Comptroller General was bound to perform, and was, therefore, ministerial. *Roberts* v. *United States*, 176 U.S. 221, 231. Being so, not only was it within the power of the court, but it was its duty, to enforce such payment. *United States ex rel. Dunlap* v. *Black*, 128 U.S. 40, 48.

The Court of Appeals seems to have been misled by the plea of the Comptroller General that "at the time the bill of complaint was filed there was a deficiency under 'Pay of the Army' in the amount of approximately $1,900,000, * * *." (R. 21.) The Court of Appeals evidently interpreted the words "there was a deficiency" to mean that the appropriation for the "Pay of the Army" was exhausted when the bill of complaint was filed.[5] The term "deficiency", however, does not mean the actual exhaustion of an appropriation and that no funds are available for disbursement. It means only that a survey of the obligations which *probably* must be met by the end of a fiscal year indicates that the balance on hand at the time of such survey will *probably* be insufficient to meet such estimated obligations. In other words, the term "deficiency" in departmental practice, means the anticipated exhaustion of an appropriation at some time between the date of survey and the end of the fiscal year. No material issue, nor indeed any issue, was thus presented by the allegation of a deficiency.

This was recognized by the Comptroller General himself in the next sentence of his answer which shows the real basis of his position. (R. 21.) The

[5] The respondent Chief of Finance in his answer admitted "that Congress has appropriated funds for payment of the pay and allowances of retired enlisted men of the Army and that such funds are now available for payment and would be paid to plaintiff if vouchers therefor would be passed by defendant McCarl." (R. 31.)

Comptroller General has at no time asserted that the appropriation "for retired pay of enlisted men" was exhausted at the time the petitioner's voucher was presented to him.

CONCLUSION

The arguments advanced above lead to the conclusion that the decision of the Court below is erroneous and should be reversed. The Comptroller General does not agree with this conclusion and accordingly he has been authorized to present his views to the contrary in a separate brief and by oral argument.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
Special Assistant to the Attorney General.
W. A. GRAHAM,
ARCHIBALD KING,
Judge Advocate General's Office,
War Department,
Of Counsel.

FEBRUARY, 1934.

APPENDIX A

CONSTITUTIONAL PROVISIONS INVOLVED

1. *The President*

The executive Power shall be vested in a President of the United States of America. (Article II, Section 1, Clause 1.)

The President shall be Commander in Chief of the Army and Navy of the United States, * * *. (Article II, Section 2, Clause 1.)

* * * he shall take Care that the Laws be faithfully executed, * * *. (Article II, Section 3, Clause 1.)

2. *The Congress*

The Congress shall have power * * *

* * * * *

To raise and support Armies, * * *

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces. (Article I, Section 8.)

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *. (Article I, Section 9, Clause 7.)

STATUTES INVOLVED

1. *The War Department*

Act of August 7, 1789, c. 7, 1 Stat. 49:

> That there shall be an executive department to be denominated the Department of

> War, and that there shall be a principal officer therein to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land * * * forces, * * * or warlike stores of the United States, or to such other matters respecting military * * * affairs as the President of the United States shall assign to the said Department * * *; and furthermore, that the said principal officer shall conduct the business of the said department in such a manner as the President of the United States shall from time to time order or instruct.

(Re-enacted in condensed form as Section 216 of the Revised Statutes; U.S. Code, Title 5, Section 190.)

2. *The Composition of the Army*

Section 1, Act of February 2, 1901, c. 192, 31 Stat. 748:

> * * * the Army of the United States, including the existing organizations, shall consist of fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry * * * a Quartermaster's Department, * * * a Medical Department * * * a Signal Corps, * * * the officers and enlisted men of the Army on the retired list, * * * Indian Scouts as now authorized by law, and such other officers and enlisted men as may hereinafter be provided for; * * *.

Section 2, National Defense Act of June 3, 1916, c. 134, 39 Stat. 166:

> COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States, including the existing organizations, shall consist of sixty-four regiments of Infantry, twenty-five regiments of cavalry * * * (enumeration) * * * a Quartermaster Corps, a Medical Department, * * * a Signal Corps, * * *: The officers and enlisted men on the retired list; * * * and unassigned recruits; * * * the Indian Scouts; and such other officers and enlisted men as are now or may be hereafter provided for: * * * *Provided further,* That the total enlisted force of the line of the Regular Army, excluding the Philippine Scouts and the enlisted men of the Quartermaster Corps, of the Medical Department, and of the Signal Corps, and the unassigned recruits, shall not at any one time, * * * exceed one hundred and seventy-five thousand men: *Provided further,* That the unassigned recruits * * * shall at no time * * * exceed by more than seven per centum the total authorized enlisted strength.

Section 2, National Defense Act of June 4, 1920, c. 227, 41 Stat. 759:

> COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; * * * the Quartermaster Corps; * * * the Medical Department; * * *

> the Indian Scouts; the officers and enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency * * *, the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts. (U.S.C., Title 10, Sec. 4.)

3. *The enlisted men of the Philippine Scouts*

Section 36, Act of February 2, 1901, c. 192, 31 Stat. 748, 757:

> That when in his opinion the conditions in the Philippine Islands justify such action the President is authorized to enlist natives of those islands for service in the Army, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time, one hundred thousand. * * * The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army. * * * [The omitted passages relate to officers only.]

Section 22, National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 181:

> All existing laws pertaining to or affecting * * * the Philippine Scouts * * * shall continue and remain in force except as herein specifically provided otherwise.

Section 22a, National Defense Act of June 4, 1920, c. 227, 41 Stat. 759, 770:

> PHILIPPINE SCOUTS.—The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient * * * organized similarly to those of the Regular Army * * *. On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified * * * shall be recommissioned in some one of the branches provided for by this Act, and those not so recommissioned shall continue to serve * * * as officers of the Philippine Scouts. * * * Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. * * * Officers of the Philippine Scouts shall hereafter be retired under the same conditions and * * * shall receive the same retired pay, as other officers * * *. Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts. (U.S.C., Title 10, Secs. 321–327.)

Act of May 10, 1926, c. 279, 44 Stat. 496:

> * * * the last sentence of the second paragraph of section 36 of the Act entitled 'An Act to increase the efficiency of the permanent Military Establishment of the United States, approved February 2, 1901,

* * * is hereby amended to read as follows:

> The pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts shall be fixed by the Secretary of War and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * * (U.S.C.App., Title 10, Sec. 334.)

4. *The Chief of Finance*

Section 9a, Act of June 4, 1920, c. 227, 41 Stat. 759, 766:

> The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage of officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War. (U.S.C., Title 10, Sec. 172.)

5. *The Retirement Acts*

Act of February 14, 1885, c. 67, 23 Stat. 305:

> * * * When an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as a private or as a noncommissioned officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank upon which he was retired.

Act of March 2, 1907, c. 2515, 34 Stat. 1217:

> * * * when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *. (U.S.C., Title 34, Sec. 431.)

6. *The Comptroller General and the General Accounting Office*

Section 8, Dockery Act of July 31, 1894, c. 174, 28 Stat. 162, 208:

> Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury [now the Comptroller General] shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (U.S.C., Title 31, Sec. 74.)

Sections 301, 304, 305, 306, and 312, Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 23, 24, 25:

> SEC. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. * * * (U.S.C., Title 31, Sec. 41.)
>
> SEC. 304. All powers and duties now conferred or imposed by law upon the Comp-

troller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921. (U.S.C., Title 31, Sec. 44.)

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." (U.S.C., Title 31, Sec. 71.)

SEC. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. * * * (U.S.C., Title 31, Sec. 46.)

SEC. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a re-

port in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

* * * * *

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

* * * * *

(U.S.C., Title 31, Sec. 53.)

C. *War Department Circular and Order involved*

1. Section II, W. D. Circular #41, September 21, 1931.

Retired pay and allowances of Philippine Scouts.—Under the provisions of the Act of February 2, 1901, as amended by the act of May 10, 1926 (44 Stat. 496), the retired pay and allowances of members of the Philippine Scouts are fixed as follows:

1. *Pay.*—Seventy-five percent (75%) of the base pay and the longevity pay received

by them on the active list at the time of their retirement.

2. *Allowances.*

a. Six dollars and thirty five cents ($6.35) per month in lieu of rations and clothing, and

b. Four dollars and fifteen cents ($4.15) per month in lieu of quarters, heat and light. (AG 220.85 (4-3-31)

* * * * *

By order of the Secretary of War:

GEO. VAN HORN MOSELEY,
Major General,
Acting Chief of Staff.

Official:

C. H. BRIDGES,
Major General,
The Adjutant General.

2. Paragraph 35, Special Orders 207, War Department, September 3, 1931:

35. Master Sergeant SANTOS MIGUEL, R-320883, Service Company, 45th Infantry (PS), will be placed on the retired list at Fort William McKinley, P. I., effective October 31, 1931, and will be sent to his home. The travel directed is necessary in the military service. QM 1600-A, 211-2. (A.G. 220.85.) (4-3-31.)

By order of the Secretary of War:

DOUGLAS MACARTHUR,
General,
Chief of Staff.

Official:

C. H. BRIDGES,
Major General,
The Adjutant General.

APPENDIX B

Books and Articles Relating to the Powers and Functions of the Comptroller General

BOOKS

Hotchkiss, The Judicial Work of the Comptroller of the Treasury (1911).

Langeluttig, The Department of Justice of the United States (1927), c. XIII.

Smith, The General Accounting Office (1927).

Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government (1927).

ARTICLES

Langeluttig, *Legal Status of the Comptroller General of the United States* (1929) 23 Illinois Law Review 556.

McGuire,[6] *The Accounting Officers of the United States and Judicial Precedents* (1925) 19 Illinois Law Review 523.

McGuire,[6] *Legislative or Executive Control over Accounting for Federal Funds* (1926) 20 Illinois Law Review 455.

McGuire,[6] *The Opinions of the Attorney General and the General Accounting Office* (1927) 15 Georgetown Law Journal, 115.

[6] Mr. McGuire is a member of the Comptroller General's legal staff.

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